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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 827

CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, et al.,

Appellants,

v.

UNITED STATES OF AMERICA, et al.

No. 828

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Appellants,

v.

UNITED STATES OF AMERICA, et al.

On appeal from the United States District Court for the Southern District of Texas

MOTION TO AFFIRM

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MOTION TO AFFIRM

The Nueces County Navigation District No. 1 and Gulf Compress, interveners on behalf of Defendants in the Court below, submit this motion to affirm the unanimous decision and order of the three-judge Court, handed down at Houston, Texas, August 11, 1966. (Appendix, pages 1 and 11).[1]

[1] Refers to jurisdictional statements by Galveston, et al., and AT&SF Railway, et al.

NO SUBSTANTIAL QUESTION IS PRESENTED

The jurisdictional statement by the City of Galveston, et al., presents five questions, while the statement by the A.T.&S.F. Ry., et al, presents eight questions. The questions presented in each statement deal with the same issues and are based on erroneous constructions of findings by the Interstate Commerce Commission and the trial Court. They are too insubstantial to require consideration by this Court.

GEOGRAPHICAL LOCATION OF PORTS

Both jurisdictional statements assume that the decisions of the Commission and the lower Court deprive Galveston and Houston of the benefit of their geographical locations so far as the cotton produced in the origin territory is concerned. Galveston is the principal cotton port of the United States (*Witnesses Boehl* and *Gallagher*). During the last four years reported in the I.C.C. record the annual average cotton exported through Galveston, Houston and Corpus Christi is shown below:

Port of Export	*Bales*	*Percent*
Galveston	1,719,239	55.4
Houston	1,019,929	32.8
Corpus Christi	366,995	11.8

The Commission so found (Appendix 17) and that finding was based on uncontroverted testimony (*Witness Williams*, Exhibit 18).

Galveston is the oldest of the three ports. Galveston was *the Texas port* prior to the Civil War. Houston recently

celebrated its fiftieth anniversary. The Port of Corpus Christi was opened in 1926 (R. 18).[2]

The production of cotton in the origin territory involved in the Commission complaint is very substantial. The territory is shown on Map Exhibit 8 of the Commission record, Exhibit 2. It is North Texas on and north of the Texas & Pacific Railroad shown on that map, all of Oklahoma and eastern New Mexico. Approximately 25 per cent of all cotton produced in the United States is produced in that area (App. 16). The average annual production in bales is shown in each county. In counties where no figures are shown there is no production.

Map Ex. 8 is drawn to scale. One inch on the map equals 62½ miles; 1.6 inches equal 100 miles (I.C.C. record, Exhibit 2, page 191). If you place a ruler on that map you will find that the area in red is ½ inch closer to Corpus Christi than to Galveston. Geographically, the main cotton producing area is closer to Corpus Christi than to Galveston.

The average number of bales produced in the origin area during the years 1962 and 1963 is shown below:

Northern Texas	3,123,753 bales
Oklahoma	278,858 bales
Eastern New Mexico	199,430 bales

The production in northern Texas is about 80 per cent of the State's total production. Mere than 50 per cent of the State's total production is produced in the ten counties outlined in red on Map Exhibit 8 (Appendix 16 and 17).

[2] See transcript of testimony before Interstate Commerce Commission in Exhibit 2 of the I.C.C. record (R. 18).

The foregoing findings were based on facts presented by *Witness Jamison* (I.C.C. Exhibit 9 and R. 192) and *Witness Broxterman* (I.C.C. Exhibit B-1, Corrected).

The average weighted highway distances, based on the 1962-63 production, from the involved origin area to Galveston and Corpus Christi are as follows:

	Highway Distances (Miles) to	
From	*Corpus Christi*	*Galveston*
Texas	537	559
Oklahoma	578	530
New Mexico	667	737
Total average	547	567

The railroads do not run direct from the principal cotton producing area to Corpus Christi and the weighted average distances via railroads are as follows:

	Railroad Distances (Miles) to	
From	*Corpus Christi*	*Galveston*
Texas	648	581
Oklahoma	613	516
New Mexico	811	796
Total average	654	588

The average rail short-line distance to Corpus Christi exceeds the rail distance to Galveston by 10.1 per cent. (*Witness Jamison*, Exhibit 10 and R. 194).

The Commission cited the railroad distances (Appendix 22) but it did not specifically mention the highway distances. However, it found that the distances "are slightly more to Corpus Christi" (Appendix 23), evidently referring to railroad distances. Highway distances are 20 miles longer to Galveston than to Corpus Christi.

The Docket 28300 distances shown in an appendix to the Commission's decision (Appendix 26 and 27) are rate bases calculated and published by the railroads in response to the order in *Class Rate Investigation*, 1939, 262 I.C.C. 447. They are based on groups at origin and destination. They do not purport to reflect the actual distances to Galveston. As stated by the Commission:

> "the docket No. 28300 distances, as noted in the above table, are about the same as the short-line distances from the various origins to Houston and Corpus Christi, and they are about 48 miles less than the short-line distance to Galveston" (Appendix 23).

If the extra 48 miles are added to the Docket 28300 distances shown on Appendix 26 and 27, the distances to Corpus Christi from the origins there shown will be found to average 13.3 per cent greater than the distances to Galveston. But the average weighted distances shown in *Witness Jamison's* Exhibit 10 before the Commission more nearly reflect the actual service performed by the railroads.

Both jurisdictional statements refer on page 5 to the finding (Appendix 23) that the Docket 28300 distances to Corpus Christi exceed those distances to Houston by "from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls." Galveston is the primary cotton port which sets the competitive rates and the distances to Galveston are 48 miles farther.

Geographically, Corpus Christi is 20 miles nearer than Galveston to the cotton producing counties in the origin area here involved. Based on the actual railroad mileages via circuitous routes to Corpus Christi, it is 10.1 per cent

farther than Galveston. Galveston has no geographical advantage over Corpus Christi and the rates should be the same to both ports.

RATE RELATIONSHIP

At the time the complaint was filed, rates from the stations shown on pages 26 and 27 of both Jurisdictional Statements were considerably higher to Corpus Christi than to Galveston. As stated by the Commission (Appendix 16), the Texas & Pacific and associated railroads voluntarily reduced the rates to Corpus Christi after the evidence was in. Rates from those origins are now the same as the rates to Galveston when shipments move via the Texas & Pacific Ry. From those origins via other routes and from all other origins, the rates to Corpus Christi are shown to be very much higher than the rates to Galveston. Many of those rates were reduced, effective October 28, 1964, so that they are only 5 cents per 100 lbs. higher than the rates to Galveston (Appendix 16). But that results in a 25 cent penalty for the privilege of using the Port of Corpus Christi. Since the steamship rates are the same from Corpus Christi as from Galveston (Appendix 16), cotton will not move via the Port of Corpus Christi if the inland rail rates are higher to that port than to Galveston.

Appendix D of the Galveston statement is erroneous because it assumes that the distances there shown reflect the actual distances. The distances to Galveston there shown should be increased 48 miles in each instance. That will change the class rates to Galveston shown in Col. 6 and the percentage relations shown in Columns 8 and 9.

The testimony of all witnesses before the Commission showed that the rates on export cotton at the time of the hearing from the involved origin territory to Corpus Christi were very much higher than to Galveston and in many instances they were higher than to New Orleans. See testimony of *Witness Jamison*, beginning at page 197, and his exhibits 12, 13 and 14, included in Commission record Exhibit No. 2. There was no controverting testimony.

RATE HISTORY

Prior to the 1930-31 cotton season, the rates on cotton from the Texas origins herein involved were identically the same to Galveston, Houston and Corpus Christi (*Witness Jamison*, pages 1 and 2, verified statement in Commission record Exhibit 1). During the season 1930-31, the movement of cotton by highway increased to such a volume that it constituted a serious menace to the traffic and revenues of the rail carriers. After two efforts, four railroads (one of which serves Corpus Christi) published reduced rail rates on cotton, effective August 7, 1933, but they applied only to Galveston, Houston and Texas City (*Witness Altgilbers*, pages 3 and 4, verified statement in Commission record Exhibit 1).

Witness Altgilbers further testified for Defendants before the Commission that the truck rate from Lubbock to Corpus Christi at the time of the hearing was $2.85 per bale, compared with a rate of $2.925 per bale to Houston. See pages 22 and 23 of his verified statement. During the five years immediately preceding the Commission hearing,

94,049 bales per annum moved from the complaint origin area to Corpus Christi. Less than 5,000 bales moved by rail. The remainder moved via trucks. See Exhibits 4, 7 and 11 of Commission record Exhibit 1. The amount of cotton that moved from this origin area to Galveston and Houston is not shown in the record but the record is clear that the railroads encountered as much competition from the highways to Corpus Christi as they did to Galveston and Houston.

The Commission made the following findings as to motor truck competition at Corpus Christi:

> "There is motor competition for the cotton traffic from origins in the considered area to Corpus Christi". * * * "During the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi and during the last 2 years all of this cotton moved by truck." * * * "Since that time (1961) all movements from the complaint area have been by truck." (Appendix, pages 17 and 18.)

Neither the Appellants nor the intervening railroads offered any evidence before the Commission showing that there is any more motor truck competition to Galveston and Houston than to Corpus Christi. In fact, they failed to show how much cotton from the origin area actually moved by truck.

Based on uncontroverted evidence (*Witness Jamison*, R. 200-204, Commission record, Exhibit 2) the Commission found that the transportation conditions are substantially the same from points of origin to Galveston, Houston, Texas City and Corpus Christi (Appendix 23). The distances to Corpus Christi are "slightly more", 10.1 per cent greater than to

Galveston via rail routes. However, the highway distance to Corpus Christi is less than to Galveston and the basis for the reduced rates to Galveston was the highway competition.

As found by the Commission (Appendix 19), the railroad rates were further reduced an average of 10 cents per 100 pounds, effective September 17, 1963. This had the effect of diverting cotton from trucks to rails. Since the rail rates after that date were lower to Galveston and Houston, the rail shipments moved to those ports rather than to Corpus Christi. The 1963 reduction was accomplished by a so-called allowance system which is still under investigation by the Interstate Commerce Commission. The allowances are still in effect at this writing.

CORPUS CHRISTI IS UNDULY PREJUDICED

The disparity in rates shown in the Commission's findings are causing serious damage to the Port of Corpus Christi and the Gulf Compress. So long as cotton could move by truck from this origin area to Corpus Christi there was a considerable movement of export cotton through that port. *Witness Grevelle* testified for the Gulf Compress that as soon as the truck allowance, referred to in the previous section, became effective, it "just the same thing as killed it (the movement). It is just dead." He estimated that his losses because of that fact would amount to $200,000 per year. See R. 160, Commission record, Exhibit 2.

The Commission found that cotton would not move from the origin area to Corpus Christi at the rail rates resulting from the 10 cent allowance (50 cents per bale) and that

the assailed rates from origins other than those in several counties in north east Texas and eastern Oklahoma are and for the future will be unduly prejudicial to Corpus Christi and unduly preferential to Galveston and Houston. See Appendix, pages 19, 24 and 25.

There is no question about the sufficiency of the Commission's finding as to undue prejudice and it was based on substantial and uncontroverted evidence as to injury and damage.

COMMISSION FOLLOWED LONG-ESTABLISHED POLICY

Appellants say that this Court should make it clear that questions of preference and prejudice among ports are to be decided on the facts of record but they have failed to point out the facts in the Commission's record that are contrary to its findings. Among many findings the following significant findings appear in the decision:

1. Rates to Corpus Christi exceed the rates to Galveston and Houston by as much as 38½ cents per 100 lbs. Appendix 26-27.
2. Ocean rates from the three ports are the same. Appendix 16.
3. After the hearing, four of the 27 defendants equalized rates to Corpus Christi from their origins. Appendix 16.
4. Corpus Christi has adequate facilities for cotton. Appendix 16.

5. Origin area is an important cotton producing area. Appendix 16, 17.

6. Galveston is the most important cotton port. Appendix 17.

7. More than 100,000 bales from the origin area has moved annually to Corpus Christi. Appendix 18.

8. Amount trucked to Galveston and Houston not shown. Appendix 18.

9. Lower rates to competing ports are on a motor competitive level. Appendix 19.

10. Corpus Christi can not attract cotton on rates higher than to Galveston and Houston. Appendix 20.

11. General terrain of the territory is the same to all three ports. Appendix 21.

12. Docket 28300 distances to Galveston (shown on pages 26 and 27 of Appendix) are about 48 miles less than actual distances. Appendix 23.

13. Transportation conditions to all three ports are the same but the rail distances to Corpus Christi are slightly more. Appendix 23.

14. Assailed rates are unduly prejudicial to Corpus Christi. Appendix 24, 25.

The Commission's findings are amply supported by the evidence and they are adequate to sustain the Commission's order. It acted within the scope of its authority. It did not abuse its discretion. The trial Court correctly stated its duty in cases of this kind (Appendix 2 and 3) and its decision and order are amply supported by the Commission record.

The Commission has always recognized the fact that a port of export is merely a transfer point on one of several competing routes between origins in the United States and

destinations in foreign countries. When steamship rates from competing ports to foreign destinations are the same, as in this case, export shipments to such destinations will not move through ports which do not enjoy the same inland rates that apply to competing ports. More than forty years ago the Commission held that competing ports should be grouped for rate making purposes in so far as export and import traffic is concerned. It said:

> "Grouping is generally more justifiable and has been more extensively employed in making rates on export and import traffic than on domestic traffic." *Galveston Commercial Association v. G. H. & S. A. Ry.*, 100 I.C.C. 110, 122 (1925).

On further consideration in that case the Commission issued orders requiring that the grouping of New Orleans and Galveston should be limited to situations where the distance to one port does not exceed the distance to the more favored port by more than 25 per cent. Beyond the 25 per cent range differential rates were prescribed. *Galveston Commercial Association v. G. H. & S. A. Ry.*, 128 I.C.C. 349, 388, and 160 I.C.C. 345, 359.[1]

Appellants contend that there is a conflict between the decision of the Commission in this case and the decision in *Nueces County Navigation District No. 1 v. Abilene & Southern Ry.*, 155 I.C.C. 712 (1929). The District Court considered that contention and dismissed it with a foot note (Appendix, page 9) indicating that conditions have changed since that decision. We call attention to the fact that the

[1] This case was reversed on other grounds in *Texas & Pacific Railway Co. v. United States*, 289 U.S. 627 (1933) but the 25 per cent figure was not in question.

origin territory in that case was quite different from the origin territory involved in the Commission's order here under consideration.

The complaint in the foregoing case was filed October 22, 1927, and included Arkansas, Louisiana and all of Texas. The record showed that the heavy producing territory at that time was in Eastern Texas, Arkansas and Louisiana and the Commission found:

> "The port of Corpus Christi is more remote from the heavy cotton-producing territory than the other Texas ports" (716).

The order in that case was vacated July 24, 1940, and is no longer in existence. The complaint in the case now under consideration included north Texas but the Commission's order applied only to that portion of north Texas lying west of Fort Worth. The entire northeastern section of north Texas was excluded from the order. Arkansas and Louisiana origins were not involved.

Today the main production of cotton in Texas is in the red area indicated on Map Exhibit 8 (Commission record Exhibit 2). As shown in that map, cotton production in eastern Texas has almost ceased. Less than 500 bales are ginned in many east Texas counties. As the District Court stated, "Much has happened since then" (Appendix 9).

In disposing of this case, the Commission has followed a long-standing policy concerning port relationships. The District Court unanimously approved the results, though it might have used different language in some cases if it had been

writing the decision. However, as stated (Appendix 1 through 4), that is not the function of the Courts.

WHEREFORE, we respectfully ask that the decision and order of the District Court be in all things affirmed.

Respectfully submitted,

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